

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2003-000384-001 DT

03/02/2004

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED: _____

STATE OF ARIZONA

B DON TAYLOR

v.

ART J MOYER JR. (001)

MICHAEL J DEW

PHX CITY MUNICIPAL COURT
REMAND DESK-LCA-CCC

RECORD APPEAL RULE / REMAND

PHOENIX CITY COURT

Cit. No. #130156528

Charge: 1) DUI-LIQUOR/DRUGS/VAPORS/COMBO
2) DUI W/BAC OF .08 OR MORE

DOB: 10/21/64

DOC: 08/18/02

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

This case has been under advisement since its assignment on January 12, 2004. This decision is made within 60 days as required by Rule 9.9, Maricopa County Superior Court Local Rules of Practice. This Court has considered and reviewed the record of the proceedings from the Phoenix City Court, and the memoranda submitted by counsel.

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The only issue presented for review in this case is whether the trial judge (the Honorable Richard Garcia) erred in granting the prosecution's Motion in Limine precluding evidence from a defense expert witness on the issue of personal variables and their effect upon a breath test in general.

The prosecutor moved to limit the testimony of defense expert, Chester Flaxmayer, in regard to the specific issues of how breathing patterns in general could affect a breath test result, how a person's body temperature could affect a breath test result and any other speculative evidence not based upon the facts of the case. The prosecutor argued that without the defendant's testimony as to specific and peculiar breathing patterns or an unusual body temperature, or outdoor temperature, the defense expert's testimony was irrelevant, speculative, and designed to confuse the jury.¹

The trial judge agreed with the position of the Appellee (the State) finding:

Guthrie² indicates that the defense must present evidence that the personal -- that the persons (the defendants) particular variables are in fact different that what the machine is set at, in particular they talk about body temperature, phase of alcohol metabolism, ventilation, perfusion, abnormalities such as you're discussing, ethanol in the mouth, and regurgitation of alcohol are all -- blood consistency, breathing patterns, and verinmental factors, barometric pressure are all factors that can affect the reading as it's -- as the test is performed. But it only because relevant where the defendant, either by personal testimony or by some other independent evidence, establishes that his particular condition at the time of the test is significantly different from the norm.³

It appears from the record that the trial judge correctly applied the Guthrie case. More importantly, the record in this case supports the trial judge's ruling and the prosecutor's position that without particular and specific evidence that Appellant's physical condition at the time he took the breath test was different in a material way from the majority of those person's who take the test, the proposed expert testimony was not relevant.

IT IS ORDERED affirming the judgments of guilt and sentences imposed by the Phoenix City Court in this case.

IT IS FURTHER ORDERED remanding this matter back to the Phoenix City Court for all further and future proceedings in this case.

¹ R.T. of April 16, 2003, at pages 1-3.

² Guthrie v. Jones, 202 Ariz. 273, 43 P.3d 601 (App. 2002).

³ R.T. of April 16, 2003, at page 3.

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/ s / HONORABLE MICHAEL D. JONES

JUDICIAL OFFICER OF THE SUPERIOR COURT